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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-675

MARTIN SCHWARTZ,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MARTIN SCHWARTZ,

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—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Martin Schwartz, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on October 8, 1975, which affirmed a judgment of conviction previously entered against him in the United States District Court for the Southern District of New York.

Opinion Below

The Court of Appeals affirmed the judgment of conviction in a Memorandum-Order, *United States* v. *Martin Schwartz*, — F.2d —, Docket No. 75-1256 (2d Cir., October 8, 1975). The Memorandum-Order of the Court of Appeals is reproduced as Appendix A hereto, *infra*, at p. 1a.*

* References herein to the appendices annexed to this petition are as follows: "-a". References preceded by "A" are to the Appellant's Appendix filed in the Court of Appeals with respect to the instant appeal. References preceded by "Tr." are to the trial transcript.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on October 8, 1975 (1a).

Questions Presented for Review

After a Federal jury trial, petitioner was convicted upon two counts of mail fraud (18 U.S.C. § 1341) and two counts of pledging or disposing of merchandise which had been unlawfully converted (18 U.S.C. § 2315). Each of the four counts was predicated upon petitioner's conduct with respect to a single Jackson Pollock drawing entitled "Crucifixion". The trial court charged the jury that the same allegedly fraudulent conduct upon which the mail fraud counts were predicated was "enough to constitute unlawful taking for the purpose of" the unlawful conversion counts (A. 412). The issue for the jury, therefore, was whether the government's evidence established knowing participation by petitioner in such fraudulent conduct. Within that context, the following questions are presented for review:

1. Where the government seeks to establish knowing participation in criminal fraud, must it fail, as a matter of law and as a matter of due process, when its evidence consists solely of proof that the defendant was aware that the person from whom he had acquired the chattel had demonstrated fraudulent propensities with respect to other, unrelated matters?

2. Where one acquires title to a chattel, without actual knowledge of criminal fraud existing in the prior chain of title, may he exercise the rights of ownership even after he learns of such criminal fraud? If he exercises the rights of ownership under such circumstances, does he thereby become a party to the criminal fraud?

Constitutional and Statutory Provisions Involved

This case involves the Due Process Clause of the Fifth Amendment.

Petitioner was convicted of violating the following Federal criminal statutes: 18 U.S.C. § 2, § 1341 and § 2315.

Reference is made in the text of this petition to the New York Uniform Commercial Code, § 1-201 (19, 44), § 2-403, and § 2-702.

Each of these constitutional and statutory provisions is reproduced in Appendix B, hereto, *infra*, at pp. 3a *et seq.*

Statement of the Case

A. The Relationship of Petitioner to Peter Wertz and to Antique Investors, Inc.

The petitioner is a member of the Bar of the State of New York. Throughout the time relevant to this case, he was engaged in the general practice of law with offices in Manhattan. He is not an art collector, and, until the events of this case, he had never represented anyone in the art business (Tr. 961-4).

In September, 1972, petitioner acquired a client who was introduced to him as "Peter Wertz". Unbeknownst to petitioner until sometime thereafter, Wertz had "an arrest record" (Tr. 711), and his true name was Harold Von Maker.* Wertz was the controlling shareholder and sole operating officer of a business called Antique Investors, Inc. [hereinafter, "Antique Investors"], which

* So as to avoid confusion, Von Maker will hereinafter be referred to solely as "Peter Wertz", since that is the name by which the trial witnesses knew him during most of these events. Although named as a codefendant, Wertz was a fugitive at the time of trial.

was engaged in the purchase and sale of works of art. Antique Investors had been formed and was in operation before petitioner's acquaintance with Wertz, and petitioner has never been a shareholder of the company (Tr. 966).

Wertz resided in an elaborate mansion in Peekskill, New York, which had formerly been owned by the entertainer, Jackie Gleason (A. 191, Tr. 293, 410, 526-7, 888-90, 989).

An accountant brought Wertz and the petitioner together so that petitioner might represent Wertz and Antique Investors in future legal transactions relating to the sale of works of art. It was agreed that petitioner would be retained at the rate of $1000 per month plus additional charges as warranted (Tr. 964-5).

It can thus be seen that the Wertz/Antique Investors image depicted to petitioner at the outset of his retainer and during the ensuing period was that of a very substantial and sophisticated enterprise. Indeed, as petitioner came to learn during the summer and fall of 1973, the art work possessed by Antique Investors had an actual sale value of approximately $3.5 million (See: GX 118 at A. 298-316; GX 190 at A. 348-359; and Tr. 271-2, 889-90).

At the trial, there was no evidence whatsoever that petitioner had anything to do with the purchase of art by Antique Investors or with the prices, income tax returns or bookkeeping of the Company, or of Wertz personally. Petitioner testified in his own behalf and denied such involvement (Tr. 967).

Aside from the attorney-client relationship, described *supra*, petitioner and Wertz, during the summer of 1973, became co-investors, with others, in a South American vegetable growing enterprise (Tr. 383-393, 401-404, 985, 991-2; GX 150 at A. 344).

B. The Acquisition of the Pollock Drawing by Peter Wertz

In the beginning of June, 1973, Maxwell Galleries of San Francisco, California, commenced a telephone and letter dialogue with Peter Wertz, who identified himself as a New York art collector (GX 7 at A. 238; A. 18-25).*

On July 31, 1973, Maxwell Galleries offered a Jackson Pollock drawing, entitled "Crucifixion" (GX 1) to Wertz for $30,000 (GX 8 at A. 239; A. 33). Thereafter, Wertz was also offered a painting entitled "Susanna" (GX 2), by the artist Thomas Hart Benton, for $25,000 (A. 35-6).

During the course of a telephone conversation, Wertz gave several references, including the Chelsea National Bank and the owner of a prominent New York art gallery. Maxwell Galleries checked with the Bank and received a good report concerning Wertz. No effort was made to check the other references (A. 36-7, 123-4).

On or about August 11, 1973, Wertz accepted the Galleries' offer that he purchase the two works. He was requested to confirm his acceptance in writing, and he did so on that date (GX at A. 241; A. 35-6). His letter confirmed the purchase and agreed to payment within thirty days (GX 9 at A. 241).

The Benton was sent to Wertz on September 6, 1973, and the Pollock was sent to him on September 13, 1973. On September 25, 1973, Maxwell Galleries billed Wertz

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* The owner of Maxwell Galleries, Marc Hoffman (A. 115 *et seq.*) and his assistant, Blanche Rubenstein (A. 16 *et seq.*), both testified as government witnesses. All of Wertz's dealings were with one or the other of these two individuals, but chiefly with Miss Rubenstein.

for the paintings (GX 12 at A. 244). On October 2, 1973, not yet having been paid for the Pollock or the Benton, the Gallery offered to sell Wertz a third work of art for $45,000; Wertz agreed to purchase it (GX 13 at A. 245; A. 50), and the third purchase was sent to him on October 9, 1973 (A. 47-53).*

Following a pleasant correspondence with the Gallery unrelated to the above noted acquisitions (GX 17 at A. 249; 250), Wertz was billed for the third purchase on October 31, 1973 (GX 18 at A. 251). Notwithstanding his continued failure to pay for any of the three works of art, Maxwell Galleries' correspondence and billings to Wertz made clear that the sales had been consummated and that the three works were his (*See*: each of the government exhibits noted *supra*. *See also*: the Galleries' letter to Wertz dated November 25, 1973 [GX 20 at A. 253]).

Petitioner testified at the trial, without contradiction, that there came a time in mid-October, 1973, when he confronted Wertz with the fact that Antique Investors was indebted to petitioner to the extent of over $35,000 for legal services that had been rendered since the inception of the retainer agreement. Wertz responded that he did not have funds available and prevailed upon petitioner to accept a work of art in payment of the debt. It was agreed that if petitioner sold the work of art or

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* For the purpose of preserving a chronological sequence, it should be noted at this point that on October 5, 1973, petitioner learned for the first time, through an F.B.I. agent, that Wertz's true name was Harold Von Maker and, in the words of the agent, who testified at trial, "Mr. Von Maker had a reputation for being a confidence man in the art world and furthermore that he had an arrest record" (Tr. 711). Petitioner immediately confronted Wertz with what he had learned and Wertz advised petitioner that he had been rehabilitated, that Antique Investors was a legitimate art business, and that he wanted to get a fresh start (Tr. 1018, 1020).

obtained a loan utilizing it as security, any excess over the fees owed would be credited against future legal fees. The work of art in question was the Jackson Pollock drawing, "Crucifixion" (Tr. 1010-11).

Petitioner himself, was in need of funds in order to fulfill an investment commitment to the South American enterprise (*supra*, p. 4). On November 2, 1973, pursuant to Wertz's mid-October offer, petitioner received the Pollock drawing, together with a bill of sale in consideration of prior legal services (Tr. 1010-1011, 1022-1026; GX 217 at A. 363).

At or about the same time as he acquired the Pollock drawing, petitioner commenced efforts to pledge the drawing as security for a bank loan. He secured such a loan and pledged the drawing on November 28, 1973. According to a government witness of concededly dubious credibility, petitioner learned, on November 26, 1973, that Wertz had not yet paid Maxwell Galleries for the drawing. Other evidence in the case arguably demonstrated that petitioner *could not* have acquired this information until sometime in December, 1973. Petitioner testified that he *did not* acquire this information until January, 1974 (Tr. 490-1, 890-1, 895-6, 943, 1031-3; *see also*: GX 24 at A. 257).

Whichever of these versions is believed, the only fact which the evidence shows was communicated to petitioner was the fact that Wertz had not paid for the Pollock drawing he had purchased. No claim of fraud was communicated to petitioner nor were any facts concerning Wertz's dealings with Maxwell Galleries communicated to petitioner. The only fact communicated was that Wertz had purchased the drawing and had not yet paid for it. Petitioner immediately confronted Wertz with that fact, and Wertz represented that he intended to pay for the drawing by liquidating some of his other assets. Wertz

admitted, however, that he had deceived petitioner as to the original source of the Pollock drawing. At the time of the transfer to petitioner, Wertz showed petitioner a document which purported to be a bill of sale from the Sloan Galleries of New York (Tr. 1032). After examining the bills of sale from Maxwell Galleries to Wertz, petitioner researched the Uniform Commercial Code, and concluded that the bills of sale represented a true sale to Wertz. That sale was not encumbered by a security interest (Tr. 1031-5). At trial, a government witness attested to the fact that Wertz repeatedly expressed an intent to pay Maxwell Galleries (A. 232-3; *see also*: Tr. 569-70 and GX 130 at A. 322).

By all accounts, petitioner's first communication from Maxwell Galleries was on January 21, 1974. Having learned that petitioner was Wertz's attorney, the proprietor of Maxwell Galleries called petitioner from San Francisco and a meeting was arranged at petitioner's New York office (A. 156-7). The meeting occurred on January 24, 1974. During that meeting, petitioner revealed that Wertz had given him the Pollock drawing in payment of legal fees and that petitioner had pledged the drawing with a bank as security for a loan (A. 157-9). A careful examination of the trial testimony of the proprietor of Maxwell Galleries (Hoffman), reveals that he *only* told petitioner that the drawing had not been paid for. Moreover, it was Hoffman's admission at trial that he was willing to take payment instead of the drawing (A. 152-3). *Nowhere in Hoffman's trial testimony did he claim that he told petitioner that he had been defrauded out of the drawing.* More specifically, Hoffman did not claim to have complained to petitioner that Wertz had used a false name or that Wertz had indicated that he was purchasing the Pollock drawing for his own collection and not for re-sale, or that payment had been due within thirty days, or that Wertz had made any other misrepresentations. In short, Hoffman merely purported to be a creditor.

On January 31, 1974, Hoffman sent a telegram to the bank at which petitioner had pledged the drawing. The telegram asserted a claim of ownership with respect to the drawing, and demanded its return (GX 34 at A. 267). On February 4, 1974, due to Hoffman's telegram, the bank returned the drawing to petitioner (Tr. 366-7, 1043-4). When Hoffman demanded that petitioner surrender the drawing to him, petitioner refused to do so (GX 35 at A. 268; GX 36 at A. 269; A.161-2).

On February 12, 1974, F.B.I. agents, under the guise of being private citizens from Ohio, called upon petitioner and offered to purchase the Pollock drawing. When he showed them the drawing, the bill of sale from Wertz, and an appraisal, they arrested him (Tr. 715-721, 805 *et seq.*).

Upon being questioned by the F.B.I. agents and by an Assistant United States Attorney, petitioner revealed his course of dealings as to the drawing, the manner in which he had acquired it, and the discussion with Hoffman (Tr. 721-732).

Petitioner testified in his own behalf (Tr. 962, *et seq.*), and denied any criminal intent with respect to his involvement with the Pollock drawing. Moreover, he attested to his good faith, his belief that he had received good title to the drawing, and to his lack of knowledge with respect to any fraudulent representations which may have been made by Wertz to Maxwell Galleries. Moreover, as corroborated by government witnesses, petitioner confirmed his understanding that the proceeds of certain art sales were to be utilized by Wertz to pay his outstanding financial obligations (Tr. 1067-71).

Reasons for Granting the Writ

This case presents important questions with respect to the application and scope of the Federal mail fraud (18 U.S.C. § 1341) and conversion (18 U.S.C. § 2315) statutes. More specifically, petitioner contends that his prosecution was predicated upon an impermissible enlargement of the character of conduct proscribed by those statutes, and that his conviction was a result of a diminution of the reasonable doubt standard to a level below that required by the Due Process Clause of the Constitution and by the proper administration of justice in the Federal courts.

I

There was absolutely no evidence, direct or circumstantial, that petitioner had any role in the acquisition of the Pollock drawing or that he had any knowledge concerning the existence of that drawing prior to its tender to him by Wertz in mid-October, 1973. The sale of the drawing to Wertz by Maxwell Galleries was confirmed in writing in early August, 1973. Maxwell Galleries actually transferred the drawing to Wertz on September 13, 1973 (*supra*, p. 5). Notwithstanding Wertz's failure to pay for the drawing, Maxwell Galleries continued to extend credit to him through mid-December, 1973 (*supra*, p. 6).

Wertz transferred title to the drawing to petitioner on November 2, 1973 (*supra*, p. 7). A view of the evidence in a light most favorable to the government reveals that petitioner first learned on November 26 or November 27, 1973 that the drawing had been acquired by Wertz from Maxwell Galleries and had not been paid for. As late as January 24, 1974, when the owner of Maxwell Galleries visited petitioner, the only claim made to the petitioner was that Wertz had not paid for the

drawing. Although the Gallery owner testified as a government witness at trial, he did not claim that he had told petitioner that Wertz had made any fraudulent misrepresentations in securing ownership of the drawing.

In view of the government's inability to directly or circumstantially establish actual knowledge of petitioner that Wertz had obtained the drawing by fraud the government, instead, proceeded upon an extremely vague theory of guilty knowledge flowing from petitioner's alleged awareness that Wertz generally did business under an assumed name and that Wertz was in the habit of failing to meet credit commitments. We shall assume, for the purposes of this petition, that petitioner was aware at the time of his own acquisition of the Pollock drawing, that Wertz had engaged in a variety of unethical business practices, unrelated to the acquisition of the Pollock drawing.

In recent years, this Court has declared its concern with respect to the dilution of the reasonable doubt standard. In *In Re Winship*, 397 U.S. 358 (1970), it was held, *inter alia*:

> "The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.
>
> * * * * *
>
> "Moreover, use of the reasonable doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a

> standard of proof that leaves people in doubt whether innocent men are being condemned." (397 U.S. at 363).

The holding of *Winship, supra,* was reasserted and expanded in *Mullaney* v. *Wilbur,* — U.S. —, 95 S.Ct. 1881 (1975), where this Court declared unconstitutional a state effort to place upon the defendant the burden of establishing an element which would reduce the degree of a crime with which he was charged.

The quantity and nature of proof relied upon by the government in the present case represented a dilution of the reasonable doubt standard in conflict with the principles enunciated in the aforementioned opinions. As was stated in *United States* v. *Piepgrass,* 425 F.2d 194, at 199 (9th Cir. 1970):

> ". . . [W]e must be ever mindful that the requisite mental state in a prosecution for fraud is a specific intent to defraud and not merely knowledge of shadowy dealings."

In permitting a finding of criminal liability, based upon the petitioner's alleged knowledge of Wertz's unrelated shadowy dealings, the courts below sanctioned the very type of impermissible inference condemned by this Court in *Beck* v. *Ohio,* 379 U.S. 89 (1964). In *Beck,* an arresting officer had relied upon the prior arrest and conviction record of a defendant. This Court reversed the conviction and stated as follows:

> "But to hold that knowledge of either or both [prior arrests or conviction for a similar type of crime] of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will" (379 U.S. at 97, bracketed material added).

See also: *People* v. *McGroder*, 26 A.D. 2d 615, 272 N.Y.S. 2d 63 (4th Dept., 1966); *United States ex rel. Polson* v. *Myers*, 245 F. Supp. 746 (E.D. Pa., 1965); *Application of Tomich*, 221 F. Supp. 500 (D. Mont., 1963); *United States* v. *Cotter*, 80 F. Supp. 590 (E.D. Va., 1948).

If such information does not establish probable cause to arrest, then it can hardly establish guilt beyond a reasonable doubt.

In *Ingram* v. *United States*, 360 U.S. 672 (1959), this Court reaffirmed the proposition that:

> "Without knowledge, the intent cannot exist. * * * Furthermore to establish an intent, the evidence of knowledge must be clear and not equivocal. * * * This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes" (360 U.S. at 680).

In *United States* v. *Sworthout*, 420 F.2d 831 at 833 (6th Cir., 1970), the Court concisely stated the principle which required the dismissal of the instant prosecution at the end of the government's case:

> "Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond reasonable doubt of the particular offense of the federal criminal law with which the defendant has been charged."

In the present case, the government did not produce a scintilla of evidence that petitioner had actual knowl-

edge of any fraudulent conduct in the procurement of the Pollock drawing by Wertz. At most, the government established that, at a point after petitioner acquired title to the drawing, he learned that the person from whom he acquired it had not fulfilled an agreement to pay for it. This did not constitute sufficient evidence of knowledge or specific intent to create a *prima facie* case as against petitioner with respect to the four charges of the indictment. *See*: *Curley* v. *United States*, 160 F. 2d 229 at 232-233 (D.C. Cir., 1947); Wright, *Federal Practice and Procedure*, § 467; Orfield, *Criminal Procedure Under the Federal Rules*, §29:18; *Moore's Federal Practice*, Volume 8, § 29.06 [Cipes' Edition].

Petitioner's contentions in this regard squarely conform to the reversals of judgments of convictions against attorneys in *United States* v. *Brown*, 225 F.2d 751 (7th Cir., 1955), at 755-759 and *Milam* v. *United States*, 322 F.2d 104 (5th Cir., 1963) at 106-108.

If the judgment of conviction herein is permitted to stand, it will represent an unprecedented expansion of liability under the Federal criminal fraud statutes. This Court has recently declared that it will not countenance an unwarranted expansion of the scope of the mail fraud statute, *United States* v. *Maze*, 414 U.S. 395 (1974).

II

Assuming, *arguendo*, that the facts made known to petitioner *after* he received title and possession of the drawing were sufficient to indicate prior fraud on the part of Wertz with respect to the procurement of the drawing, then civil principles applicable to sales under these circumstances gave petitioner good title and he was not required to surrender the drawing. This is made clear by the New York enactment of the Uniform Commercial Code, the relevant provisions of which are reproduced in full in Appendix B of this petition.

New York UCC § 2-702 provides, in pertinent part, as follows with regard to the "Seller's [Maxwell Galleries'] Remedies on Discovery of Buyer's [Wertz's] Insolvency":

> "(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. *Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.*
>
> "(3) *The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (§ 2-403).* Successful reclamation of goods excludes all other remedies with respect to them." [Emphasis added].

It is clear, therefore, that even if Wertz fraudulently misrepresented either his solvency or his intent to pay, then Wertz's title to the painting was voidable only as against Wertz. If the petitioner was a "good faith purchaser", then he received good title which could not be attacked by Maxwell Galleries.

Our contention in this regard is further enforced by New York UCC § 2-403 which provides that a purchaser (Wertz) has power to transfer good title, "Even though":

> "(a) the transferror [Maxwell Galleries] was deceived as to the identity of the purchaser, or
>
> * * * * *

"(d) the delivery was procured through fraud punishable as larcenous under the criminal law."

UCC § 1-201(19) defines "good faith" as being "honesty in fact in the conduct of the transaction concerned." UCC § 1-201(44)(b) includes within the definition of "value" the "total or partial satisfaction of a pre-existing claim."

It can thus be seen that, as of the date when petitioner acquired title to the drawing (November 2, 1973), at a point when he had no knowledge whatsoever concerning the transaction with Maxwell Galleries, he satisfied the requirements of being "in good faith" and a buyer for "value". As set forth, *supra*, under UCC § 2-702(3) and § 2-403, he secured title to the drawing superior to any rights previously held by Maxwell Galleries.

See also: Ross v. *Leuci*, 194 Misc. 345, 85 N.Y.S. 2d 497 (City of New York, 1949); *Stanton Motor Corp.* v. *Rosetti*, 11 A.D. 2d 296, 203 N.Y.S. 2d 273 (3d Dept. 1960).

Moreover, in the present case, Maxwell Galleries did not retain any security interest in the drawing nor did it act with expedition when Wertz failed to make timely payments. In short, from all outward appearances, Wertz was fully entitled to dispose of the drawing as he wished.

The Uniform Commercial Code provisions cited *supra* have been enacted throughout the United States.*

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* *See*: Table of Jurisdictions and Statutory Citations which appears at p. 21 of 1974-1975 pocket part of McKinney's *Consolidated Laws of New York*, annotated, Book 62½, Uniform Commercial Code § 1-101 to § 2-725.

If the holding of the lower courts in this case is permitted to stand, those provisions of the Uniform Commercial Code will be rendered a nullity. Ironically, the standard for criminal liability will be substantially more broad than that for civil liability.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of conviction should be reversed, and the indictment should be dismissed.

Respectfully submitted,

EDWARD BRODSKY
HENRY J. BOITEL
Attorneys for Petitioner

November, 1975

APPENDIX A

Memorandum—Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of October, one thousand nine hundred and seventy-five.

Present: Honorable Irving R. Kaufman,
Chief Judge,

Honorable Henry J. Friendly,
Honorable J. Joseph Smith
Circuit Judges.

75-1256

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARTIN SCHWARTZ,
Appellant.

Appeal from the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge.*

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the said judgment of said District Court be and it hereby is affirmed.

"The test of sufficiency in criminal cases is 'whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt'." *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.) (citation omitted), *cert. denied*, 419 U.S. 82 (1974).

One Harold Von Maker, alias Peter Wertz, engaged in a series of fraudulent transactions in art works. Schwartz, who had acted as Von Maker's lawyer, dealt in some of the fraudulently obtained works, and was arrested after offering to sell one for $100,000 to two individuals who turned out to be FBI agents.

The crucial question here was the extent and time of Schwartz's knowledge of Von Maker's fraud. We are satisfied that the jury on the evidence before it was justified in inferring that Schwartz had knowledge of the fraud before his own knowing participation in the transactions charged.

IRVING R. KAUFMAN
Chief Judge

HENRY J. FRIENDLY
J. JOSEPH SMITH
Circuit Judges

APPENDIX B

Constitutional and Statutory Provisions Involved

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1341—*Frauds and Swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both.

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As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub. L. 91-375, § 6(j) (11), 84 Stat. 778

18 U.S.C. § 2315—*Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps*

Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

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This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. As amended Oct. 4, 1961, Pub. L. 87-371, § 3, 75 Stat. 802.

New York Uniform Commercial Code—§ 1-201—*General Definitions*

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

* * * * *

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

* * * * *

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Section 3-303, 4-208 and 4-209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

Appendix B

New York Uniform Commercial Code—§ 2-403—*Power to Transfer; Good Faith Purchase of Goods; "Entrusting"*

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.

Appendix B

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7). L.19662, c.553, eff. Sept. 27, 1964.

New York Uniform Commercial Code—§ 2-702—*Seller's Remedies on Discovery of Buyer's Insolvency*

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them. L.1962, c.553, eff. Sept. 27, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-675

MARTIN SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; on one count of pledging as security for a loan goods and merchandise that had been unlawfully converted and taken, in violation of 18 U.S.C. 2315 and 2; and on one count of receiving, concealing, storing, selling, and disposing of goods and merchandise that had been unlawfully converted and taken, in violation of 18 U.S.C. 2315 and 2.[1] He was sentenced to concurrent

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[1]Indicted with petitioner was Harold Von Maker, a/k/a Peter Wertz. He has never been tried for these offenses, however, because he became a fugitive.

terms of two years' imprisonment on each count. The court of appeals affirmed by memorandum order (Pet. App. A).

The evidence showed that in September 1972, petitioner, an attorney, agreed to represent Peter Wertz and Wertz' company, Antique Investors, Inc. (Tr. 965-969).[2] Antique Investors was engaged in buying and selling art works. Petitioner also became Wertz' business partner in a company formed to market salad vegetables grown in the Dominican Republic (Tr. 383-385, 984-989).

In October 1973, Wertz agreed to purchase three paintings from Maxwell Galleries for $100,000, among them one by Jackson Pollock (Tr. 22, 35). Payment was due within thirty days (Tr. 22, 42). Wertz did not pay within the agreed period of time (Tr. 113), and the gallery was never paid for the paintings (Tr. 78-79).[3]

At about this time petitioner learned that Wertz' real name was Von Maker (Tr. 710-711, 1014-1015, 245-247); that Von Maker was a convicted felon (Tr. 1015) and a confidence man (Tr. 711); that Von Maker previously had failed to pay for jewelry and other paintings that he had acquired from third persons (Tr. 1179-1182); and that Von Maker had never paid for the Jackson Pollock painting (Tr. 143-144).

During the same period, petitioner and Wertz obtained a loan of $100,000 from K.R.R. Associates (G. Exhs. 56, 56-A; Tr. 306). Although petitioner represented to the

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[2]"Tr." refers to the trial transcript.

[3]On December 7, 1973, Wertz sent two checks totalling $90,000 to Maxwell Galleries; neither check was backed by sufficient funds and no payment was ever collected on either check (Tr. 67-69, 127-130).

President of K.R.R. Associates that the money would be invested in Antique Investors (Tr. 307), most of it was invested in the salad vegetable company (Tr. 1003-1008). Petitioner and Wertz defaulted on the loan (Tr. 309-323).

On November 28, 1973, petitioner pledged the Jackson Pollock painting as collateral for a $75,000 loan from a New York State bank (Tr. 360-361, 493, 1011). He gave the bank a purported bill of sale from Wertz to petitioner as proof of petitioner's ownership of the painting (Tr. 362); petitioner also had a bill of sale from H.E. Sloan to Antique Investors (Tr. 490-494, 614-615). Petitioner invested a substantial portion of that loan in the salad vegetable company (Tr. 1011-1013).

Petitioner then endeavored either to sell the entire art inventory of Antique Investors (Tr. 494), or to obtain a loan by using the paintings as collateral (Tr. 500-501). When petitioner attempted to sell the Jackson Pollock painting to undercover F.B.I. agents, he was arrested (Tr. 716-721).

After his arrest, petitioner stated that he knew that the Maxwell Galleries owned the Jackson Pollock painting, that Wertz had never paid for the painting, and that the purported bill of sale from H.E. Sloan to Antique Investors was fraudulent (Tr. 722, 826-827).[4]

Petitioner contends that the evidence was insufficient to show his knowing participation in the attempt to defraud. Viewed in a light most favorable to the government, however (*Glasser* v. *United States*, 315 U.S. 60, 80),

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[4]At trial, petitioner denied making this statement (Tr. 1261).

there was ample evidence to support the jury's conclusion that petitioner was aware of the fraud. As the court of appeals observed (Pet. App. 2a):

> The crucial question here was the extent and time of [petitioner's] knowledge of Von Maker's fraud. We are satisfied that the jury on the evidence before it was justified in inferring that [petitioner] had knowledge of the fraud before his own knowing participation in the transactions charged.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12